FOR ARGUMENT

In the Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Respondent

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QUESTIONS PRESENTED

The United States Court of Appeals for the Third Circuit has held that corporate officers and directors may be held liable as individuals under 42 U.S.C. 1985(3) for harm caused by their conspiracy to deprive women of rights granted to them under Title VII of the Civil Rights Act of 1964, passed pursuant to congressional power under the commerce clause. The questions presented are:

1. Whether individual corporate officers are immune from liability for their conspiratorial discriminatory conduct merely because they acted on behalf of a single business entity.

2. Whether the prohibition against conspiracies to deprive others of federal rights fails to cover deprivations of statutorily created rights under Title VII of the Civil Rights Act of 1964.

3. Whether Congress has the constitutional authority under the commerce clause or other constitutional provision to prohibit conspiracies to deprive women of rights granted under Title VII of the Civil Rights Act of 1964.

COUNTER STATEMENT OF THE CASE

John Novotny (hereinafter called "Novotny"), having been fired from his job after almost fifteen years as an employee, brought suit in the United States District Court for the Western District of Pennsylvania against Great American Federal Savings and Loan Association (hereinafter called "Association") and nine of the Association's officers and directors (hereinafter called "Directors") (Appendix A to Brief for Petitioners on Writ of Certiorari at 1-7, hereinafter cited as Br. App. A).

The suit sought damages, attorneys fees and injunctive relief for the wrongful discharge which Novotny claimed

violated provisions of Title VII of the Civil Rights Act of 1964 and which was accomplished in violation of 42 U.S.C. §1985(3) (Br. App. A at 7).

His complaint accused the Association and Directors of instituting and perpetuating a pattern of discriminatory conduct which denied to female employees equality with male employees in job promotion and advancement (Br. App. A at 3).

The pattern was characterized in the complaint, *inter alia*, by the Association's failure to promote women with greater experience and qualification than the men who were promoted, providing training to male employees but not to females, telling male employees about job vacancies women were not told about, and generally creating and maintaining an atmosphere hostile to the advancement of women in the Association's employ (Br. App. A at 3-4).

As a result of the course of conduct complained of by Novotny, a female employee was demoted and was replaced by a less qualified male. The demotion launched a verbal protest by several of the Association's female employees which, in turn, resulted in the termination of one of them, although she was rehired after being required to submit a letter of apology to the Association's officers and directors (Br. App. A at 4-5).

During one of the bi-monthly meetings of the Board of Directors, of which he was the secretary, Novotny registered his own objection to the termination of the female employee and expressed his general support for the women who had protested the sex-based discriminatory employment practices of the Association (Br. App. A at 5).

In addition, he sought to advise the board members of the Association's obligations regarding equal employment opportunity.

Novotny's district court complaint alleged that his termination bore no relation to the manner in which he carried out his duties, but occurred solely as a result of his support of the women who had protested the Association's discriminatory policies and because, as a management member, he would have been in a position to implement practices and procedures which would have provided equal opportunity for them (Br. App. A at 6).

Novotny further contended that his termination occurred as a result of a conspiracy among the other members of the board to perpetuate the discriminatory practices (Br. App. A at 6).

Shortly after his termination, Novotny also pursued a claim under Title VII which he filed with the Equal Employment Opportunity Commission. The EEOC, on December 9, 1976, issued him a letter granting his right to sue. This claim was combined with the §1985(3) claim when suit was filed in the district court.

Following the filing by the Association of a motion to dismiss, the district court, relying in part on the "single business entity" rationale of *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), dismissed the complaint.

On appeal to the United States Court of Appeals for the Third Circuit, the parties, following argument before a three judge panel, were directed to file supplemental briefs on issues relating to the statutory scope of §1985(3) and Novotny's standing as a male to raise claims concerning discrimination against members of a class to which he did not belong.

The appeal occasioned a complete review by the circuit court of the purposes, history and scope of §1985(3). On August 7, 1978, the circuit court reversed the district court and ordered the case remanded for proceedings consistent with the opinion.

The court held, among other things, that women were not excluded from the protection of §1985(3), that discrimination against women is invidious, class-based discrimination and that Novotny, even though a male, had standing to raise a claim for damages suffered by him as a result of a conspiracy prohibited under §1985(3).

The court also held that the conspiratorial interference with a right granted under Title VII of the Civil Rights Act of 1964 could form the basis of a §1985(3) claim, that Congress had the power to legislate against such a conspiracy, and that §1985(3) and Title VII did not conflict.

Finally, the court held that individual corporate officers who conspired to deprive others of civil rights were not immune from liability for damages which resulted therefrom just because they were acting on behalf of a single business entity (the court also dealt with an issue, not relevant here, concerning the interpretation of §704(a) of Title VII).

SUMMARY OF ARGUMENT

1. Statutory Scope.

The statutory language, when accorded its apparent meaning and read against the legislative history, indicates that women were included in the protections afforded by 42 U.S.C. §1985(3) and entitled to equal treatment in the exercise of their civil rights.

In addition, this Court, in recent decisions beginning with *Craig v. Boren*, 429 U.S. 190 (1976), has exhibited a willingness to thoroughly scrutinize discriminatory enactments the benefits of which appear to depend on gender, recognizing that such classifications can stand only if they serve some important governmental objectives and are substantially related to the achievement of those objectives.

Moreover, congressional declarations make it clear that women are subject to economic deprivations as a class and

that discrimination against them is to be accorded the same degree of social concern as any other type of unlawful discrimination. In addition, sex discrimination has already been termed at least "invidious" in *Frontiero v. Richardson*, 411 U.S. 677 (1973), citing *Reed v. Reed*, 404 U.S. 71 (1971).

2. Corporate Conspiracies.

Individual corporate officers must be held liable for the consequences of their conspiratorial interferences with the federal rights of others. Nothing in the wording or history of §1985(3) suggests an immunity for corporate officers who violate the Act, even when those officers act on behalf of the corporation. Nor is there anything inherent in the corporate business form which suggests that ordinary agency and tort principles should not apply to conspiracies by corporate officers to violate federal civil rights law. Those principles have always held corporate agents liable for the consequences of their intentional or negligent tortious conduct. Moreover, the doctrine of *respondeat superior*, which makes the principal liable *as well as* the agent, provides no immunity shield to corporate officers since the doctrine is a remedy-expanding one and provides the best opportunity to the victim to recover by making both the agent and principal liable. In addition, any distinction between civil and criminal conspiracy is irrelevant to the issue of immunity for corporate officers and agents since in neither can the agent be responsible merely by virtue of the position he or she holds.

Cases which suggest that corporate officers should be immune seem to rely, in part, on principles of antitrust law which should not be applied to civil rights violations. While certain antitrust conspiracies require more than one business entity, civil rights violations may always be accomplished by individuals. Cases such as *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), therefore, which apply the immunity, impose an artificial barrier to the enforcement of a remedial statute.

3. Federal Statutory Right.

A conspiracy to deprive persons of federal rights includes a conspiracy to deprive of rights created by federal statute. Such statutorily created rights have been protected from conspiracies at least since this Court's opinion in *United States v. Waddell*, 112 U.S. 76 (1884). Title VII of the Civil Rights Act of 1964 is one such federal statute which did not render unavailable other federal remedies such as §1985(3). Moreover, the availability of independent federal remedies would not result in a disastrous multiplication of federal court actions. Congress recognized the attractiveness of choice for persons discriminated against and intended to maintain that choice for the limited number of protected classes. Furthermore, cases relied upon by the Directors may be distinguished on the ground that Congress exhibited the specific intent to create exclusive remedies in some instances but not in others.

4. Sources of Constitutional Power.

Novotny contends that at least two sources exist for the right enforced by Congress through §1985(3). Novotny contends that the constitutional basis for the right created in the instant case is the commerce clause which gave rise to Title VII of the Civil Rights Act of 1964. Accordingly, Congress could protect that right against conspiratorial interference.

In addition, Novotny suggests that the inability to contract equally for the sale of one's labor is a badge or incident of slavery rendered unlawful by the thirteenth amendment. Since the thirteenth amendment may be enforced against private individuals on behalf of *all* people, Congress had the power to legislate against private conspiracies to impose on any persons badges and incidents of slavery.

ARGUMENT

I. ACCORDING §1985(3) ITS APPARENT MEANING CONFIRMS ITS APPLICATION TO WOMEN IN THIS CASE.

A. Civil Rights Statutes, Including §1985(3), Are To Be Broadly Construed And Accorded Their Apparent Meaning.

Initially, some general rules concerning the construction of civil rights statutes, particularly §1985(3), bear reviewing.

When this Court breathed new life into §1985(3) in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), it erected signposts of statutory construction which might be followed with confidence by subsequent litigants.

Declining to determine whether *Collins v. Hardyman*, 341 U.S. 651 (1951) had been correctly decided on its facts twenty years earlier, this Court noted that "[l]ittle reason remains...not to accord to the words of the statute their apparent meaning." 403 U.S. at 96.

The Court then proceeded to examine the words of the statute for the meanings apparent "on their face," and to determine whether any inherent limitations acted to prevent enforcement in a manner consistent with those words. *Id.* at 97.

"The approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to 'accord [them] a sweep as broad as [their] language.'" *Id.* at 98.

Following a review of the text of §1985(3), the Court proceeded to confirm the meaning by reference to companion provisions and legislative history as it is contained in the congressional debates set out in the *Congressional Globe*.

B. The Text And Legislative History Of §1985(3) Support The Conclusion That It Was Intended To Protect All Persons—Including Women—From Deprivations Of Equal Protections Afforded By The Constitution Or Any Law Of The United States.

The text of §1985(3), set out in the footnote below[1] as cited in *Griffin* but with the lines numbered for ease of reference, seems certainly to apply the protection of the statute to women.

In the court below, the Directors argued in their brief that the word "person," in line 4 of the cited statute, did not include women (Supplemental Brief for Defendants-Appellees at 14, 584 F.2d 1235 (3d Cir. 1978)) and that Congress could not have contemplated the inclusion of women under the statute because women did not have some of the rights which Congress sought to protect.

Congress, however, used the words "any person or class of persons" and attached no limitation or qualification to those words.

Representative Kerr, who did not speak in favor of the passage of the Civil Rights Act of 1871, nevertheless understood that "whatever rights, privileges and immunities attach to and inhere in the citizen or citizens of the United States must belong to all alike. They must belong equally to man and woman, to adult and infant, to sane and insane, to black and white." *Cong. Globe*, 42d Cong., 1st Sess. at H. App. 47 (March 28, 1871). If this, from Representative Kerr, was an accusation, it was not denied.

[1] 42 U.S.C. §1985(3) (as cited in *Griffin*, 402 U.S. at 92):

If two or more persons in any State or Territory
conspire or go in disguise on the highway or on the
premises of another, for the purpose of depriving,
either directly or indirectly, any person or class of
persons of the equal protection of the laws, or of
equal privileges and immunities under the laws [and]
in any case of conspiracy set forth in this section,
if one or more persons engaged therein do, or cause
to be done, any act in furtherance of the object of
such conspiracy, whereby another is injured in his
person or property, or deprived of having and exercising any right or privilege of a citizen of the United
States, the party so injured or deprived may have
an action for the recovery of damages, occasioned by
such injury or deprivation, against any one or more
of the conspirators.

That the legislators recognized a difference between civil rights, which were included in "privileges and immunities," and political rights which were not, correctly suggested to the Third Circuit court, relying on a colloquy between Senator Trumbull and Senator Carpenter, that women were to be included within the scope of §1985(3). Senator Trumbull stated:

> The "privileges and immunities" referred to in the Constitution are of a civil character, applying to civil rights, and not political rights, and were never so understood. The Senator from Wisconsin asks if they [women] are not protected in all the privileges and immunities of citizens of the United States. Undoubtedly; but we have not advanced one step by that admission.

Cong. Globe, *supra*, at 576.

At least two other specific references bespeak the inclusion of women within the protections of §1985(3). Senator Morton pleaded for the security and protection of persons not because they were Republicans, but "because they are human beings; because they are men and women entitled to the protection of the laws...." *Cong. Globe*, *supra*, at S. App. 251. The other reference is that of Representative Kelley, *Cong. Globe*, *supra*, at 339, as cited by the Third Circuit in the instant case (Petition for Writ of Certiorari, Appendix A at 14a, n.24 (hereinafter cited as Pet. App. A; 584 F.2d at 1242 n.24).

In the general language which is more typical of the debates, the legislators who favored passage of the Act appear so emphatic in their use of inclusive wording that one cannot but conclude that if women were to be excluded from the protection of the bill, someone surely would have said so.

Representative Bingham asked:

> [W]hether it is competent for the Congress of the United States, under the Constitution of the United States, in pursuance of its provisions, and in the exercise of the powers vested by it...to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guarantied to him by the Constitutions.

Cong. Globe, supra, at App. 81.

Representative Lowe said:

> The cardinal doctrine of our institutions is that all citizens are equal before the law, and that the law shall equally secure to all, their natural and inalienable rights.
>
> • • •

Id. at 374-76.

Similar statements abound throughout the debates, and their force must remove from Novotny the burden of proving their inclusion, demanding of the Directors the opposing burden.

C. Recent Decisions Of This Court Suggest A Heightened Degree Of Scrutiny For Sex-Based Discrimination.

Beginning with its opinion in *Craig v. Boren*, 429 U.S. 190 (1976), this Court has exhibited a willingness to thoroughly scrutinize the purposes allegedly underlying statutes the effects of which depend on sex-based classifications. In *Craig*, this Court required the showing that "classifications by gender...serve important governmental objectives and must be *substantially related* to achievement of those objectives." 429 U.S. at 197 (emphasis added).

Califano v. Goldfarb, 430 U.S. 199 (1977) followed in the wake of *Craig*. This Court again scrutinized the asserted legislative purposes of social security provisions thoroughly enough to determine that the goal of redressing widespread economic discrimination against women could not be accomplished through a statute which was intended to grant benefits on the basis of dependency, not financial need (providing a basis for distinguishing the cases of *Kahn v. Shevin*, 416 U.S. 351 (1974) which found the operation of the statutes in question to accord with the asserted purpose of redressing the serious financial effects of past discrimination). See also *Stanton v. Stanton*, 421 U.S. 7 (1975).

On March 5, 1979, this Court reaffirmed its willingness to thoroughly scrutinize the asserted purposes of a state enactment by declaring unconstitutional the alimony laws of Alabama in *Orr v. Orr*, 47 U.S.L.W. 4224 (March 5, 1979). Citing *Craig* and *Califano v. Webster*, 430 U.S. 313 (1977), this Court determined: (1) that Alabama cannot legislatively express a preference for family role models based on wifely dependency; (2) that Alabama's administrative process already contained the mechanism for determining the relative financial circumstances of the parties so that using sex as a "proxy for need" was unjustifiable; and (3) that the operation of the statute resulted in an unjustifiable benefit to non-needy wives with needy husbands.

The rigorous examination given in these cases by the Court to statutes which grant or withhold benefits on the basis of gender justifies Novotny in his argument to the Court that any such sex-based discrimination should be

treated as an invidious one in the context of a private conspiracy under §1985(3).

D. Congress Has Recognized That Discrimination Against Women Is Class-Based And Invidious.

Since a conspiracy to deprive a person of rights he or she has by virtue of Title VII of the Civil Rights Act is actionable under §1985(3), Novotny suggests that Congress has specifically declared that women comprise a class of persons who may be subject to invidious discrimination.

Not only has Congress made the declaration simply by virtue of making sex discrimination unlawful in 1964, but it also made a specific announcement to this effect in a House Report setting forth the reasons for the 1972 Amendments to the Civil Rights Act of 1964:

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.
>
> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H. R. Rep. No. 92-238, 92d Cong., 2d Sess., *reprinted in* (1972) U.S. Code Cong. News 2137, 2140.

Accordingly, Novotny contends that Congress has declared sex discrimination to be an invidious class-based discrimination, and it is, therefore, actionable under §1985(3) assuming the other elements are met.

E. This Court Has Determined That Sex-Based Discrimination Is, Definitionally, Invidious.

Novotny further suggests that this Court has already determined in a definitional way that sex discrimination is invidious discrimination. Although the Court could not agree that sex constituted a "suspect" classification, at least five members of the Court in *Frontiero*, 411 U.S. 677, specifically determined that sex discrimination was at least invidious.

Four members of the Court, in the *Frontiero* plurality opinion, equated sex discrimination with race discrimination (*Id.* at 685) and specifically pointed out that as a result of the fact that the sex characteristic, like race and national origin, frequently bears no relation to ability, "statutory distinctions between the sexes often have the effect of *invidiously* relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Id.* at 686-87 (emphasis added).

In addition, Mr. Justice Stewart, without indicating that he wished to adopt the plurality reasoning, nevertheless agreed that the statutes in question worked "an invidious discrimination in violation of the Constitution" (*Id.* at 691), relying for that determination on *Reed v. Reed*, 404 U.S. 71 (1971), as the plurality had.

In fact, all but one of the members of this Court relied on *Reed*, and if *Reed* can stand for the proposition that class-based sex discrimination is invidious in the equal protection context, if not inherently suspect, then it should be at least equally invidious in the §1985(3) context.

Clearly, there is no difference in the nature of the discrimination alleged in the instant case and that which was the subject of *Reed, Frontiero, Craig, Webster* or *Stanton*. In every case, immutable class characteristics which bore no relationship to the actual abilities, needs or characteristics of the parties were made the criteria for the receipt of a benefit or the imposition of a disability. In regard to race discrimination, this Court has recognized the historically debilitating effect that it has had on the members of the class—and the same is also true of sex discrimination, as this Court has recognized in *Kahn v. Shevin*, 416 U.S. 351, and *Califano v. Webster*, 430 U.S. 313.

In *Griffin*, this Court cited Representative Shellabarger's expansive description of the *animus* required: *animus* the effect of which "is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizen's rights, shall be within the scope of the remedies of this section." 403 U.S. at 100. The acts and motivations of the Directors, as set forth in Novotny's brief, certainly strike down the female citizen to the end that she may not enjoy such equality of rights.

F. If The Gender-Neutral Language Of 42 U.S.C. §1983 Can Support A Sex Discrimination Claim, §1985(3), Derived From The Same Enactment, May Also.

While this Court has not answered directly whether §1983 specifically reaches sex discrimination, at least two circuit courts have suggested or decided, in the context of §1983 suits, that sex discrimination is so reached by the gender-neutral language of that statute. In *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973), the Fourth Circuit upheld a §1983 action against state officials who refused on the grounds of sex to hire women as senate pages in the senate of South Carolina. The reasoning of the court followed the reasoning of this Court in *Reed v. Reed, supra*, and seemed not to make

any distinctions based on the manner in which the challenge to the state practice arose.

In *Johnson v. City of Cincinnati*, 450 F.2d 796 (6th Cir. 1971), the court, in the context of §1983, suggested that the rational relationship test be applied to a suit by a woman prohibited because of her sex from seeking a position as a housing inspector.

In addition, *Craig*, 429 U.S. 190, was originally brought under §1983 (399 F.Supp. 1304).

Both §1983 and §1985(3) evolved from the Civil Rights Act of 1871. This Court has held that the fact that two statutes derive from the same source is some reason to conclude that they are related and even complementary. *Examining Board of Engineers, Architects & Surveyors v. Flores deOtero*, 426 U.S. 572 (1976). Accordingly, if the gender-neutral language in §1983 can support sex-discrimination claims, there is no reason to believe that women were not included within the protective scope of §1985(3).

There can be no question that discrimination based on sex is class-based. The conclusion that Novotny draws from the treatment accorded such discrimination by members of this Court is that it is at least invidious since the effect of it is to deprive persons of equal treatment under law.

II. CORPORATE DIRECTORS WHO CONSPIRE TO DEPRIVE OTHERS OF CIVIL RIGHTS UNDER FEDERAL LAW ARE NOT IMMUNE FROM PERSONAL LIABILITY FOR THE DAMAGE THEY CAUSE.

The complaint which initiated the instant action charged, among other things, that the Directors, defendants in the district court, intentionally embarked upon a course of conduct to deny to female employees equal employment

opportunity (Br. App. A at 3-4, ¶¶16, 17), and that Novotny was fired from his job not only because he openly opposed that course of conduct, but because he was, prior to his discharge, in a position, as a management employee and member of the Board of Directors, to affect the actions of the conspirators and to implement equal employment opportunities (Br. App. A at 5-6, ¶¶22, 25, 26, 27).

Paragraph 33 of the complaint (Br. App. A at 7) set forth that the "individual defendants were and are acting on behalf of GAF."

The Directors argue, essentially, that: (a) a corporation can only act through its agents and that therefore the agents of a single corporation cannot conspire when they act on behalf of the corporation; (b) the principles of conspiracy law applicable to a criminal case are inapplicable to a §1985(3) case; and (c) since the corporation was not formed *for the purpose* of fostering sex discrimination, those courts following *Dombrowski v. Dowling*, 459 F.2d 190, are correct.

A. The Nature Of The Corporate Form Provides No Shield To The Personal Liability Of Corporate Officers And Agents Who Conspire To Deprive Others Of Rights Under Federal Law.

The Third Circuit, initially looking, as it should, to the wording of the statute, determined that the sole issue was "whether concerted action by officers and employees of a corporation, with the object of violating a federal statute, can be the basis of a §1985(3) complaint" (Pet. App. A at 52a-53a; 584 F.2d at 1258), and indeed the wording of the statute gives no reason to conclude that the existence of the corporate form immunizes the individuals who are directors or agents from responsibility for acts for which they would be responsible ordinarily. When Congress wrote, "If two or

more persons in any State or Territory conspire . . ." there is no reason, as the Third Circuit recognized, to believe that the word "person" carried anything other than its natural meaning. Certainly, corporations do not "go in disguise" or use "force, intimidation or threat." Moreover, there is no indication that the word "person" in the fourth line of the statute as set forth in footnote 1 of this brief, is used any differently than the plural of the word in the fifth line, and there is nothing in the statute or the legislative history to lead to the conclusion that corporations were "persons" to be protected from deprivation of equal protection of the laws (lines 10 and 11, footnote 1). There is, in other words, nothing in the statute or the legislative history to lead to the conclusion that corporations were "persons" to be either protected or punished. Accordingly, nothing in the statute or the legislative history, said the Third Circuit, justifies the imposition of corporate form as a condition on the enforceability of §1985(3) on natural persons.

Despite the apparent language of the statute, the Directors suggest, beginning at page 11 of their brief, that the very nature of corporate structure and the principles of *respondeat superior* compel the conclusion that the agents and officers acting on behalf of a single corporation cannot form a conspiracy.

Novotny respectfully maintains, however, that the arguments of the Directors in this regard are unpersuasive and constitute a perversion of the law of principal and agent.

For example, Novotny suggests that the quotation from *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), beginning on page 11 of the Directors' brief, actually supports Novotny's notion of the corporation as a fiction whose purpose should not be extended beyond the transactional necessities of the marketplace, and its usefulness as a business tool does not require that it constitute a

shield of immunity for corporate directors who knowingly conspire to violate the law (whether civil rights or otherwise).

Several people may be considered by the law to act as a single entity so that it may manage its affairs in perpetuity as individual directors change, but the fact that a "corporation is an artificial person which can only act through its officers, directors, and other agents" (Brief for Petitioners on Writ of Certiorari at 12, hereinafter cited as Pet. Br.) does not require that those agents be absolved of responsibility for their own intentionally conspiratorial or even negligent acts, which responsibility the law traditionally placed on them. Even if we are to accept the theories of corporate existence as quoted by the Directors, the corporate form need be respected only insofar as it is necessary or desireable to do so for legitimate business activities. To the extent that such activities are illegitimate or tortious, there is nothing inherent in the corporate form which insulates the agents.

There is, however, a legal device, the doctrine of *respondeat superior*, which makes the corporation liable *as well as* the agents, but any suggestion by the Directors that *only* the corporate principal is liable to an injured party as a result of the wrongful acts of the agents is erroneous. *Cf. Restatement (Second) of Agency*, §§343-359 (1957); 3A Fletcher, *Cyclopedia of the Law of Private Corporations* (hereinafter cited as *Cyclopedia of Corporations*) §§1135, 1138, 1143; *Peck v. Cooper*, 112 Ill. 192, 54 Am.Rep. 231 (1884).

Again, Novotny has no quarrel with the general statement of the economic rationale behind the principle of *respondeat superior* set forth in note 5 on page 13 of the Directors' brief. It simply does not, however, say anything about individual or group immunity for unlawful corporate decisions by agents thereof. *Respondeat superior* is a

remedy-expanding doctrine. Under it, the principal is liable where only the agent was before. To suggest now that the doctrine may be cited as a justification for *limiting* the available remedies to the principal perverts the doctrine. There are times when the corporation is without assets but the corporate agents are not. The proper effect of the doctrine is to permit the victim to go against both or either.[2]

If, of course, the focus of civil conspiracy is not on the agreement to conspire but on compensating for the harmful results, as the Directors suggest on page 14 of their brief, then it certainly makes no sense to deprive the victim of remedies against the individuals who are responsible for the injury and who may collectively be able to bear the cost of the damages suffered.

The attempt of the Directors, on page 14 of their brief, to distinguish between two situations—where no corporation is involved and where one is involved—is, Novotny contends, patently absurd. If the Directors are really concerned with the "best opportunity" of the victim "to recover fully," then certainly, where no corporation is involved, the best opportunity is against the individuals because it is the *only* opportunity, there being no other legal entity from which to recover. Where a corporation is involved, obviously the "best opportunity to recover fully" is to be able to go against *both* the individuals and the corporation. Surely the Directors' suggestion, on page 14, that "the civil conspiracy's pur-

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[2]*See* Pet. Br. at 13 n. 6. One of the *primary* purposes, of course, for incorporation in the first instance is to shield individuals from business-related liability. Novotny suggests that undercapitalized corporations are not "relatively rare," but occur with sufficient frequency to warrant the concern of a lawyer asserting a claim on behalf of a client. Moreover, whether or not a corporation begins its fictional life in fiscal anemia, many corporations simply do not prosper and are execution proof at the time litigation arises.

pose of providing the most effective relief for victims is also effectuated" because of the corporation's vicarious liability, is self-serving and unfounded.

The Directors argue on page 15 of their brief that a rule that a corporation can conspire with its agents ignores reality. Novotny points out, however, that his original complaint does not allege a conspiracy between the agents and the corporation as the Third Circuit court recognized (Pet. App. A at 52a).. An agent *can*, however, conspire with another agent, and *that* is the reality of the instant case. Since, under traditional theories of *respondeat superior*, an agent was also liable with the corporate principal, is it not a fiction to say that two agents are immune simply because they planned their unlawful activities together?

General principles of corporate law suggest clearly that corporate directors or officers are liable for their negligently or intentionally tortious conduct and fraudulent acts and representations to persons who are injured as a result of them. 3A Fletcher, *Cyclopedia of Corporations*, §§1135, 1143; 19 C.J.S. *Corporations* §850 (1940). Moreover, the liability of corporate directors in such a situation is joint and several. 3A Fletcher, *supra*, §1138; *Schwartz v. Century Circuit, Inc.*, 39 Del. Ch. 340, 163 A.2d 793 (1960); *Hines v. Wilson*, 164 Ga. 888, 139 S.E. 802 (1927). Corporate directors, in other words, are no more immune from actions for their false statements which result in injury than any other individuals. 3A Fletcher, *supra*, §1143; 19 C.J.S. *Corporations* §850 (1940). They are not relieved of liability because they acted for the benefit of the corporation and the corporation is also liable. 9 Fletcher, *supra*, §4255.

In analogous situations involving intentionally tortious conduct, agents and directors of corporations have been held responsible for conspiracies to slander third persons by publishing false statements for the purpose of injuring

another in his business relationships.[3] And in such circumstances, both the officers *and* the corporation may be joined in the action. *Schoedler v. Motometer, supra* note 3.

Of course, as Novotny has pointed out above, the theory of *respondeat superior* acts to make the corporation liable as well for the torts of its agents committed within the scope of their express, implied or apparent authority. *Aetna Life Insurance Co. v. Mutual Benefit Health & Accident Association*, 82 F.2d 115 (8th Cir. 1936); *White v. Central Dispensary & Emergency Hospital*, 99 F.2d 355 (D.C. Cir. 1938); *VanZandt v. Bergen County*, 79 F.2d 506 (3d Cir. 1935). Furthermore, the general rule applies even if the agents have been guilty of wanton, malicious, willful or even criminal conduct as long as the conduct is within the scope of employment. 19 C.J.S. *Corporations* §1263 (1940); *Finnish Temperance Society Sovittaja v. Publishing Co.*, 238 Mass. 345, 130 N.E. 845 (1921); *W. T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860 (1928).

Accordingly, if the officers of corporations are *not* to be held liable for their conspiratorial conduct committed within their corporate authority, such immunity must be found someplace other than in the "artificial," "invisible," "intangible" and fictional corporate nature and may certainly not be found in the doctrine of *respondeat superior*. *See* Note, *Intracorporate Conspiracies Under 42 U.S.C. §1985(c)*, 92 Harv. L. Rev. 470 (1978).

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[3] *George v. Georgia Power Co.*, 43 Ga. App. 596, 159 S.E. 756 (1931) (conspiracy among corporate agents to write and receive a letter containing false statements injurious to a third person); *Schoedler v. Motometer Gauge & Equipment Corp.*, 134 Ohio St. 78, 15 N.E.2d 958 (1938) (corporate officers conspired to slander the president of another corporation in order to acquire his business and property). *See also Nottingham v. Wrigley*, 221 Ga. 386, 144 S.E.2d 749 (1965) (corporate officers held individually liable for a conspiracy to terminate employment contract of corporate employees).

B. Differences Between Civil And Criminal Conspiracy Do Not Justify Immunity Of Corporate Officers And Agents From Personal Liability For Their Conspiracy To Deprive Others Of Federal Constitutional Rights.

In interpreting §1985(3) in a manner consistent with the apparent intent of Congress to avoid the creation of a "general federal tort law," this Court imposed as an element of the cause of action a certain *mens rea* which it both named and described as an "invidiously discriminatory animus." *Griffin*, 403 U.S. at 102.

Making further reference to it as a "motivation requirement," the Court warned against confusing it with the "'specific intent to deprive a person of a federal right made definite by decision or other rule of law' articulated by the plurality opinion in *Screws v. United States*, 325 U.S. 91, 103, for prosecutions under 18 U.S.C. §242." *Griffin*, 403 U.S. at 102 n. 10.

Section §1985(3), the Court said, contains no specific requirement of "willfulness." *Id.* All that is required is that the conspirators have a general purpose to deprive a person, because of his or her membership in a class of persons, of equal enjoyment of rights secured by law to all. The conspirators need not intend to deprive one of a specific right, as required in *Screws*, and need not intend the specific harm accomplished.

It is apparently this distinction which the Directors seek to exploit in their argument beginning on page 16 of their brief.

Why such a distinction inures to the benefit of the Directors is unclear, in Novotny's opinion.

Even though the agreement itself is the "gravamen of the offense of criminal conspiracy," this has nothing at all to

do with the Directors' assertion that "[l]iability under a criminal conspiracy theory . . . is imposed on a strictly individualized basis." (Pet. Br. at 17). Axiomatic in the general body of corporate law is the proposition that a corporate officer may not be held liable merely by virtue of his office. 19 C.J.S. *Corporations* §845 (1940); 3A Fletcher, *Cyclopedia of Corporations*, §1137. A director, officer or agent is liable for the torts of the corporation or of other directors, officers, or agents when, *and only when*, he or she has participated in the tortious act, or has authorized or directed it, or has acted in his or her own behalf, or has had any knowledge of, or given consent to, the act or transaction, when he or she either knew or by the exercise of reasonable care should have known of it and should have objected and taken steps to prevent it. 19 C.J.S. *Corporations* §§845, 850 (1940); 3A Fletcher, *supra*, §1137.

If an individual is "never presumed liable because of a position which he or she occupies" in criminal conspiracy theory (Pet. Br. at 17), neither is he or she so presumed in a civil conspiracy.

Nor is there any solace for the Directors in the idea that civil conspiracy is intended to remedy the harm suffered whereas criminal conspiracy is to be punished.

That §1985(3) was intended to remedy harm, there can be no question,[4] but this speaks in *favor* of a remedy against the individuals.

This Court appears to have indicated that civil rights actions by private persons sound in tort. *Cf.* Note, *Intracorporate Conspiracies Under 42 U.S.C. §1985(c)*, 92 Harv. L. Rev. at 486 n. 91. If, therefore, the purpose of civil conspir-

[4] ". . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation. . ." 42 U.S.C. §1985(3), lines 13, 14, n.1, above.

acy in general is to provide a tort remedy for persons harmed as a result of a class-based animus, and if §1985(3) exhibits in its language just such a purpose, there is no logic in applying that remedial purpose to deprive the injured persons of responsible parties to contribute to the remedy. If indeed the purpose of civil conspiracy actions is to provide a remedy to injured parties, as the Directors contend, such purpose cannot justify immunity for agents.

The basic distinction between civil and criminal conspiracy, in fact, has no relationship at all to the issue of immunity for officers and directors of a single corporation who conspire on its behalf (As set forth above, the compensatory purpose of civil conspiracy militates *against* such immunity). The basic distinction—related to the compensatory purpose of all tort law—it that civil conspiracy requires an act[5] which results in harm, whereas in criminal conspiracy, the harm need not be accomplished. This distinction does not appear to have anything to do with the "specific intent" requirement, contrary to the assertion of the Directors. It has to do simply with the fundamental concept of civil law: only one who has been damaged may maintain an action in tort and it ordinarily requires some act to cause damage. If civil conspiracy is to be actionable, it must have resulted in damage. "Unlike a criminal conspiracy, the existence of a civil conspiracy depends entirely upon the character of the acts following an unlawful combination." Comment, *Civil Conspiracy and Interference with Contractual Relations*, 8 Loy. L.A.L. Rev. 302, 306 (1975). Criminal conspiracy may be punished, however, even if the acts agreed upon are never committed and no harm occurs.

[5]Not necessarily to be confused with the very minimal "overt act" requirement of the federal and state criminal conspiracy statutes. *Cf.* Comment, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 945-46 (1959).

Nevertheless, while it is necessary to prove damages to prevail in a civil conspiracy case, both types of conspiracy, civil and criminal, are frequently defined as an agreement between two or more persons to do a criminal or otherwise unlawful act or to do a lawful act by criminal or unlawful means. Burdick, *Conspiracy as a Crime and as a Tort*, 7 Colum. L. Rev. 229 (1907). Nothing in their common elements would suggest that civil conspirators may claim any exemption from the tort law principle that persons must bear the consequences of their own voluntary acts.

The Third Circuit did indeed cite, in support of its decision on the conspiracy issue, some criminal conspiracy cases (Pet. App. A at 53a-54a; 584 F.2d at 1258), as the Directors have pointed out in their brief (Pet. Br. at 16 n. 9, and accompanying text). The court did not rely *solely* upon criminal cases, however, and cited this Court's opinion in *Pennsylvania R.R. System & Allied Lines, Fed. No. 90 v. Pennsylvania R.R. Co.*, 267 U.S. 203 (1925), as support for the concept of a conspiracy composed of corporate officers.

Had the Third Circuit relied solely on criminal cases, however, its reliance would not be misplaced since the evils of conspiracy, as summarized by Justice Frankfurter in *Callanan v. United States*, 364 U.S. 587 (1961), and cited in the Directors' brief at page 19, are the same, whether the conspiracy results in civil or criminal sanction. The argument of the Directors, in other words, based on Justice Frankfurter's summarization, is an artificial contrivance that has no basis in law. Every danger set forth by Justice Frankfurter exists in a civil conspiracy except that the ultimate harm is civil damage instead of a criminal act. Moreover, of course, Congress in fact legislated criminal sanctions for the same kind of conspiracies in 18 U.S.C. §241, a fact overlooked by the Directors.

While the Directors suggest (erroneously, Novotny believes) that the number of officers involved did not

increase the potential harm to the public (Pet. Br. at 20), Novotny suggests the obverse: the fact that the officers and directors conspired on behalf of a corporation did not *lessen* the potential for the harm to the public.

Accordingly, Novotny suggests that the Directors' analysis which distinguishes civil from criminal conspiracy does not warrant a reversal of the circuit court.

C. The Law Of Corporate Conspiracy As Set Forth In Dombrowski v. Dowling Should Not Be Adopted By This Court.

While the Directors suggest that the distinction between civil and criminal conspiracies somehow explain why every other circuit court except the Third has ruled that officers and directors of a corporation cannot form a §1985(3) conspiracy (Pet. Br. at 21), Novotny notes that in *Dombrowski v. Dowling*, 459 F.2d 190, no such analysis appears. Nor does it appear in any of the other cases cited by the Directors on page 22 of their brief. No such analysis appears, Novotny respectfully suggests, because it is inapposite to the issue.

The Directors suggest that because the corporation was not formed specifically for the *purpose* of discrimination, piercing the corporate veil serves no function in this instance. For this proposition, the Directors rely upon *Dombrowski* and its interpretation in *Cole v. University of Hartford*, 391 F.Supp. 888 (D.Conn. 1975), and obviously assume that corporate officers who are intent on discriminating will publicly announce their "avowedly discriminatory purposes." (Pet. Br. at 24).

Novotny respectfully suggests, however, that *Dombrowski* and the cases it has spawned espouse a view of corporate existence useful for some aspect of business marketplace but not extendable to the interpretation of civil rights legislation.

Courts which have considered but failed to apply *Dombrowski* have generally made factual distinctions based on the nature or number of acts perpetrated by the corporate defendants, and/or the size and nature of the corporation itself. In *Rackin v. University of Pennsylvania*, 386 F.Supp. 992 (E.D. Pa. 1974), the court held *Dombrowski* inapplicable where the plaintiff alleged many continuing instances of discrimination and harassing treatment by the alleged conspirators. Such allegations constituted more than the "essentially...single act of discrimination by a single business entity" which was crucial to *Dombrowski*. 386 F.Supp. at 1005-06. Defendants raised the identical argument in *Jackson v. University of Pittsburgh*, 405 F.Supp. 607 (W.D. Pa. 1975), but Judge Scalera chose to follow *Rackin* and *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971), and denied defendant's motion to dismiss the §1985(3) claims, which motion was based on the ground that actions of university officials were actions of a single entity.

In *Dupree v. Hertz Corp.*, 419 F.Supp. 764 (E.D. Pa. 1976), Judge Newcomer attempted to reconcile the seemingly inconsistent decisions on whether a complaint naming corporate officials as conspirators states a cause of action under §1985(3):

> These cases indicate that the size of the corporation, the number of acts of discrimination, and the number of persons or entities involved in making corporate decisions must be considered in applying §1985(3) to a single firm conspiracy. Here the defendant [Hertz Corporation] is a very large corporation with numerous separate offices, the Complaint alleges a broad policy of discrimination rather than a single discriminatory act, and the plaintiff is not challenging a specific, formally adopted corporate policy...These allegations bring this case closer to the factual situation in *Rackin v. University of Pennsylvania* than to the facts in the *Girard* and *Dombrowski* line of cases.

419 F.Supp. at 766.

Finally, in *Beamon v. W.B. Saunders Co.*, 413 F.Supp. 1167 (E.D. Pa. 1976), Judge Fullam refused to accept the *Dombrowski* line of reasoning to support a motion to dismiss:

> [W]hile I recognize that the lower courts have taken inconsistent positions with respect to the question of whether officials of a single corporation can conspire with one another, I am not disposed to dismiss the §1985(3) claim at this point in the proceedings. Presentation of evidence on questions such as the number of business entities or individuals involved, should be taken before undertaking the ambitious task of attempting to define the constitutional scope of §1985(3).

413 F.Supp. at 1176-77.

Novotny contends, however, that the *Dombrowski* rationale represents a transplant from antitrust theories of conspiracy[6] which have no place in civil rights law. In other words, Novotny suggests that although two or more corporate officers or employees acting on behalf of a *single* business entity may not be able to accomplish the harm to be prevented by antitrust conspiracy law unless they involve another competing business entity, two or more corporate officers or employees acting on behalf of a single business entity *can* accomplish the harms to be prevented by civil rights law *without* involving another business entity.

Novotny compares antitrust conspiracy to civil rights conspiracy because, in general, some courts which have avoided finding the existence of a §1985(3) conspiracy by the agents of a single business entity seem largely to have relied upon antitrust theory as set forth in *Nelson Radio & Supply Co. v. Motorola, Inc.*, *supra* note 6. *Nelson* was cited

[6]As evidenced in *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied* 345 U.S. 925 (1953), cited by the Directors in Pet. Br. at 11, 14, 16.

in *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70 (2d Cir. 1976), *cert. denied* 425 U.S. 974 (1976), and in *Cole v. University of Hartford*, 390 F.Supp. at 891, the reasoning of which has been commended to this court by the Directors (Pet. Br. at 23). Its reasoning, however, as well as the reasoning in *Nelson*, should be limited only to the antitrust field, if not rejected entirely.

The concept of "business entity" discrimination created by Judge Stevens seems to Novotny to be irrelevant to 42 U.S.C. §1985(3), which speaks in terms of "persons."

The purpose of the antitrust laws is to promote competition *among* business entities. Where competition *may* be restrained within the corporate structure, as with affiliated or vertically integrated corporations, such structure will not immunize the corporation from the antitrust laws. *Cf. United States v. Yellow Cab Co.*, 322 U.S. 218 (1947), where this Court warned, "the affiliation [of corporations] is assertedly one of the means of effectuating the illegal conspiracy not to compete." 322 U.S. at 229. The Third Circuit has also noted that "common ownership or control of corporations does not insulate them from the antitrust laws," citing exceptions to the general rules. *Johnston v. Baker*, 445 F.2d 424, 427 (3d Cir. 1971). The purpose of §1985(3) is to prohibit invidious conspiracies among individuals directed toward deprivation of constitutionally-protected rights. It is at the very first level of analysis (the legislative purpose) that the antitrust-civil rights analogy breaks down. For antitrust violations, the corporation may be considered an individual which has conspired with another corporation. For civil rights purposes, each individual member of the corporation is capable of violating §1985(3) with any other individual or individuals.

The *Dombrowski* decision specifically noted that its holding would not extend to all corporate activity. 459 F.2d at 193. It warned that members of the Klan could not success-

fully defend acts of violence on the basis that they were merely agents of the Grand Dragon. But, can those very same members, sitting on corporate boards of banks or real estate agencies, intentionally effect policies of employment discrimination or discrimination in housing by performing their functions as acts of collective business judgment?

The case cited by Judge Stevens in *Dombrowski—Morrison v. California*, 291 U.S. 82 (1934)—involved the charging of two individuals for conspiracy to violate the California Alien Land Law. At 291 U.S. at 92, the Supreme Court discussed the nature of conspiracy and the fact that it is impossible in the nature of things for a man to conspire with himself. But the decision in *Morrison* is explainable on factual grounds. The *Morrison* Court is talking about natural persons in a criminal indictment. The defendent Doi could not be guilty of conspiracy because there was no proof that Morrison knew Doi was not a citizen. 291 U.S. at 93. In other words, as a matter of factual proof, Morrison could not be connected to the alleged crimes. That left only Doi, who could not conspire with himself.

The reasoning of Judge Meskill, following *Dombrowski* in *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, seems equally alien to civil rights law:

> Here there is but one single business entity with a managerial policy implemented by the one governing board, while at the University of Pennsylvania,[in *Rackin*], each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policy making body but of several bodies; thus the court correctly held that the allegations supported a claim of conspiracy among them. Here plaintiff's allegations of multiple acts by the directors are not alleged to be other than the implementation of a single policy by a single policy making body.

Id. at 71.

Novotny asserts, however, that the very nature of a conspiracy *requires* a "single policy" upon which the conspirators agree. Otherwise, it would not be a conspiracy. *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *United States v. Kates*, 508 F.2d 308 (3d Cir. 1975). The fact, therefore, that a "single policy" is arrived at is no reason to deny the existence of a conspiracy. Why the corporate entity can be broken down to "departments" and not to individuals is not explained.

Judge Meskill's addition of the "one policy making body" concept to the "single business entity" concept, and his attempted distinction of *Rackin*, 386 F.Supp. 992, are totally unsupported within the law of conspiracy. His assertion that the individual defendants comprise the board of directors through which the corporation acted and that the consent of the board was required before a transfer of ownership interest could be made (530 F.2d at 71) is perfectly consistent with conspiracy theory.

Novotny maintains that antitrust principles of conspiracy are unique to that field and exist because of the limited business purposes of the antitrust statutes, and that those principles should not be engrafted onto general conspiracy law in fields not specifically related to business enterprise.

The particular aim of the antitrust conspiracy prohibition is set forth in cases such as *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911, in which Circuit Judge Borah noted, *inter alia*:

> Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served or the quality of goods to be produced do not result in the corporation being

> engaged in a conspiracy in unlawful restraint of trade under the Sherman Act....
>
> The Act does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy. The defendant is a corporate person and as such it can act only through its officers and representatives. It has the right as a single manufacturer to select its customers and to refuse to sell its goods to anyone for any or no reason whatsoever. It does not violate the Act when it exercises its rights through its officers and agents, which is the only medium through which it can possibly act.

Id. at 914.

In other words, the officers and directors cannot be guilty of conspiring to do that which the corporation "as a *single* manufacturer" had the right to do in the conduct of its business. The analysis derives not from ascertaining the nature of a conspiracy, but solely from the business purpose of the acts performed and decision made. The officers and directors are not guilty of conspiracy not because they didn't "conspire", but because what they conspired to do was not illegal. An invidious discrimination under Title VII of the Civil Rights Act, however, by definition has no business purpose, is illegal, and can be accomplished within a single business entity.

As stated in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), "The purpose of the Sherman Act is...to preserve the right of freedom of trade", and as the Fifth Circuit has recognized, "It is fundamental that at least two independent *business entities* are required for violation of Section 1, while one alone is sufficient under Section 2." *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966) (emphasis added.)

Even where several corporations have been involved in antitrust activity, the Supreme Court has looked to the *economic significance* of the combination, recognizing that an antitrust violation requires a combination or conspiracy in *restraint of trade*, not just any combination or conspiracy. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962); *United States v. Yellow Cab Co.*, 322 U.S. 218.

Antitrust conspiracy principles, therefore, should not be permitted to operate as one exception to normal conspiracy principles in the civil rights field.[7] Natural persons *can* conspire, whether as corporate officers of a single business

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[7] *Cf.* Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L.J. 5 (1963); Comment, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. at 1000; and Note, *Intracorporate Conspiracies Under 42 U.S.C. §1985(c)*, 92 Harv. L. Rev. 470, 479-80 (1978).

For citations to decisions prior to *Nelson* in which corporate officers were held liable in civil and criminal situations for antitrust violations:

Patterson v. United States, 222 F.599 (6th Cir. 1915) *cert. denied* 238 U.S. 635 (1915); *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600 (8th Cir. 1942); *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943), *cert. denied*, 320 U.S. 788 (1943); *Schoedler v. Motometer Gauge & Equip. Corp.*, 134 Ohio St. 78, 15 N.E.2d 958 (1938);

Cf. also, *Mininsohn v. United States*, 101 F.2d 477 (3d. Cir. 1939), cited by the Third Circuit in its opinion in *Novotny* (Pet. App. A at 53a; 584 F.2d at 1258); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); and *United States v. Yellow Cab Co.*, 322 U.S. 218 (1947), in which the Supreme Court stated:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.

332 U.S. at 227.

entity or not, and there is no reason why their corporate or business positions should insulate them when their conspiracies result in deprivations of civil rights.

This is so because an antitrust conspiracy arguably involves motivations related to corporate business and competition not typically tinged with personal prejudice or malice. Discrimination on the basis of sex cannot, however, by definition, have a competitive purpose and is tinged with personal prejudice and malice. It is, in fact, competitively detrimental because its tendency is to reduce the number of employees employed by the corporation because of their talent. By definition, discrimination on the basis of sex, therefore, can have no legitimate business purpose.

Accordingly, Novotny urges this Court to adopt the reasoning of the Third Circuit and not that of *Dombrowski*.

III. A CONSPIRACY TO VIOLATE RIGHTS GRANTED BY TITLE VII IS ACTIONABLE UNDER 1985(3).

A. 1985(3) Applies To Conspiracies To Deprive Persons Of Rights Created By Federal Statute.

In analyzing the relationship between §1985(3) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, the Third Circuit began, again where it should, with the language and history of the statute in question, and specifically with the words "equal protection of the laws" and "equal privileges and immunities under the laws."

The question was, of course, of which laws may we not be deprived equal protection? The Directors argue, beginning at page 25 of their brief, that in §1985(3) Congress intended to protect only those "fundamental rights of citizens" which had just recently been accorded black persons

under the thirteenth, fourteenth and fifteenth amendments.[8] Novotny argues that the Third Circuit was correct in reading congressional purpose in a significantly broader context, and suggests as well that the law as expressed by this Court dictates the Third Circuit's support.

To the Third Circuit's interpretation of §1985(3) based upon its wording and legislative history (*Cf.* Pet. App. A at 27a, n. 52; 584 F.2d at 1247 n. 52), the Directors have asserted no specific response. Novotny, accordingly, can only suggest that the Circuit Court's reading of the various statements by the senators and representatives is a fair one and leads naturally to the conclusion that Congress intended to protect citizens from conspiracies based on invidiously discriminatory animus to deprive them of rights accorded them under *any* of the laws which Congress had the constitutional authority to promulgate.

The Directors' primary foray into the legislative history of §1985(3) concerns the amendment to Section 2 of the 1871 Act, which amendment, *inter alia*, deleted a list of state police power crimes and added a civil remedy. This amendment, the Directors assert, makes it "clear" that the statute's purpose was to provide a "federal forum for the vindication of violations of fundamental rights of citizens . . ." (Pet. Br. at 29).

Why such an amendment leads the Directors to conclude that Congress had no intent to provide remedies for violations of federal statutory rights and privileges, they do not indicate. In support of their proposition, however, the Directors cite *District of Columbia v. Carter*, 409 U.S. 418 (1973), which, Novotny contends, is inapplicable to the

[8]Novotny does not argue that the securing of fundamental rights of citizenship was not a purpose of Congress, but suggests on the contrary that the securing of such righs to *all* persons was a purpose of Congress which it could accomplish through its authority under the thirteenth amendment. See Novotny's argument beginning on page 52 *infra*.

instant issue before the Court. As *Carter* points out, the provision of federal jurisdiction was a function of Section 1 of the 1871 Act (now 42 U.S.C. §1983) which was concerned solely with deprivations by state officials. At the time the Act of 1871 was passed, this Court notes in *Carter*, there was no federal-question jurisdiction in the federal trial courts and the power to vindicate constitutional or federal rights was vested in the state courts. Section 1 of the Act was Congress' effort to remedy that misplaced reliance upon state officials:

> Although there are threads of many thoughts running through the debates on the 1871 Act, it seems clear that §1 of the Act, with which we are here concerned, was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others.

409 U.S. at 426, citing similar language in *Monroe v. Pape*, 365 U.S. 167 (1961).

Since §1985(3), however, deals with private conspiracies and since in a long line of cases beginning with the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), this Court has held fast to the proposition that Congress has no authority to legislate against private conspiracies to deprive persons of rights and privileges running between them and the states (*United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1883); *Civil Rights Cases*, 109 U.S. 3 (1883)), §1985(3) must apply to the relationships between individuals and the national government. 83 U.S. (16 Wall.) at 78-79.

The holding of the Court in the *Slaughter-House Cases*, did not include a definitive explanation of what those rights are, although it suggested a few possibilities, including the rights of travel to the nation's capital, protection on the high seas, of peaceable assembly and to petition the government for redress of grievances. 83 U.S. (16 Wall.) at 79-80.

The cornerstone of the Directors' argument in this regard is that a federal statutory right is *not* a right which is entitled to protection under §1985(3). The Third Circuit said that it *is* (Pet. App. A at 28a, n.56; 584 F.2d at 1248 n.56), and relied in part on the ninety-five year old case of *United States v. Waddell*, 112 U.S. 76 (1884). *Waddell*, a criminal action involving Revised Statute §5508 (now 18 U.S.C. §241), concerned a conspiracy to interfere with rights of the victim under a federal statute, the Homestead Act (Rev. Stat. §§2289-2291, 18 Stat. 422 (1895)). Novotny suggests that the treatment of *Waddell* by the circuit court in a footnote to its opinion (Pet. App. A at 28a, n.56; 584 F.2d at 1248 n.56) belies the importance of the case in this context. [9] *Waddell* contains the following language:

> The protection of this section [Rev. Stat. §5508 (1875)] extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guarantee safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties *as well as statutes*, and it does not, in this section at least, design to protect any other rights. (Emphasis added).
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> • • •
>
> The right assailed, obstructed, and its exercise prevented or intended to be prevented, as set out in this petition, is very clearly a right wholly dependent upon the act of congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an act of Congress.

112 U.S. at 79.

The constitutional power of Congress to pass the Homestead Acts in the first instance derived from Article 4,

[9] *See* Note, *The Reach of 42 U.S.C. §1985(3): Sex Discrimination as a Gauge*, 25 Clev. St. L. Rev. 331 (1976).

§3, clause 2, regarding the regulation of the territories, and it is patently clear that the Court in *Waddell* was dealing with a statutorily-created right ("No such right exists or can exist outside of an Act of Congress" 112 U.S. at 79) and *not* one of the "fundamental rights of citizens" alluded to by the Directors.

While the Directors suggest, beginning at page 30 of their brief, that the "independent illegality" theory expressed in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*), is unsound, it is clear that the Third Circuit specifically avoided adopting that analysis (Pet. App. A at 29a, n. 55; 584 F.2d at 1247 n.55). The Circuit indicated only that there was sufficient connotation of laws *outside* §1985(3) to warrant the conclusion, when the words of the statute were measured against the words of the congressmen, that §1985(3) protected against the conspiratorial interference with a statutorily created right to equal employment opportunity. Based on all of the foregoing in this regard, the Third Circuit's determination must be supported.

B. Title VII Was Not Intended To Replace Or Supplant Any Other Federal Law Which Might Exist To Remedy Employment Discrimination.

In addition to what Novotny has contended is a weak legislative history attack on the Third Circuit's reasoning in regard to conspiracies to interfere with statutory rights, the Directors' main thrust suggests that the Circuit's interpretation ignores the alleged issues regarding the fact that the federal statute creating the right may have its own independent federal jurisdictional base (Pet. Br. at 31).

In general, Novotny suggests, the objections of the Directors to the Third Circuit ruling on this issue have already been determined against them by prior decision of this Court.

The Third Circuit, far from "ignoring" the issue, dealt with it in its opinion (Pet. App. A at 36a; 584 F.2d at 1251). The primary thrust of the Third Circuit opinion is that there is no conflict between §1985(3) and Title VII and that Congress specifically determined *not* to make Title VII the exclusive federal remedy for employment discrimination, rejecting statutory amendments which would have done exactly that.

The argument of the Directors would seem to have been foreclosed by this Court's opinions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

In *Alexander*, the Court dealt generally with the question of whether an individual could pursue a Title VII remedy after having submitted a race discrimination case to binding grievance and arbitration procedures contained in a collective bargaining agreement. After noting that judicial power to entertain a Title VII claim was simply a question of jurisdiction for which the requirements had been met, the Court noted that "[i]n addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination". 415 U.S. at 47.

In *Alexander* (415 U.S. at 47 n. 7), the Court references as examples of overlapping or parallel remedies both 42 U.S.C. §1981, from the Civil Rights Act of 1866, and 42 U.S.C. §1983, formerly Section 1 of the Civil Rights Act of 1871. Of course, the Third Circuit referenced as well that portion of the *Alexander* opinion (415 U.S. at 49 n. 9), which speaks for itself regarding congressional intent to repeal directly or by implication any "existing rights granted under other laws".

In *Johnson*, this Court dealt directly with the question of the relationship between Title VII and one of the civil rights

acts—§1981. The Court specifically held that "the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct and independent". 421 U.S. at 461.

In so concluding, the Court made reference to congressional indications that 1981 was to survive as an augment to Title VII (*Id.* at 459), and recognized that while a suit under 1981 might interfere with the administrative process of Title VII, such was the natural effect of "the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies." (*Id.* at 461).

To the extent that the Directors may be understood to suggest that Title VII is the exclusive remedy for private discrimination in employment, therefore, they appear to be in error.

Where Congress has not indicated an intent to make Title VII the exclusive remedy, this Court has not been persuaded by the argument that the non-Title VII remedy might be more attractive to a litigant.[10] The Court recognized that the choice of remedies is a valuable one: "Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true." *Johnson v. Railway Express Agency*, 421 U.S. at 461. In other words, Novotny argues that §1985(3) represents the assertion of legitimate federal interests in preventing the conspiratorial deprivation of equality of treatment. Not every violation of Title VII will be a conspiracy (the special dangers of which Congress and this Court have repeatedly

[10] "An individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. [citations deleted] And a backpay award under §1981 is not restricted to the two years specified for backpay recovery under Title VII." *Johnson v. Railway Express Agency*, 421 U.S. at 460.

recognized); not even every violation involving more than one violator will constitute a conspiracy proscribed in §1985(3).

Even where there *was* an exclusivity provision in Title II of the Civil Rights Act, this Court acknowledged the interest to be served by the enforcement of §1985(3) against conspirators ("outside hoodlums" who interfered with persons equal enjoyment of public accommodations in *United States v. Johnson*, 390 U.S. 563 (1968)), and a similar interest should be recognized in this case.

This Court has cited several items from the legislative history of the Civil Rights Act of 1964 and the 1972 amendments thereto in support of the proposition that Congress did not intend to abrogate prior remedies which might exist for employment discrimination. Novotny suggests that there are others which should also be considered.

With regard to Senator Tower's Amendment to the Civil Rights Act of 1964, there appears even in the legislative debates concerning this amendment no indication that the "exclusivity" was to be applied to prevent individuals from seeking judicial redress under independent federal laws. 110 *Cong. Rec.* 13650-52 (1964), cited in *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48 n. 9. As Senator Tower himself indicated: "All that would be precluded by my amendment would be simultaneous, concurrent requirements placed upon an employer or union by more than one Federal Agency." 110 *Cong. Rec.* 13650 (1964).

He repeated this purpose on more than one occasion during the discussion on the amendment and there was no indication at all that the amendment, even if passed, would have affected the jurisdiction of the federal courts over other civil rights statutes.

Senator Williams, quoted in part by the Third Circuit (Pet. App. A at 39a; 584 F.2d at 1252), himself quoted testim-

ony presented before the committee by a representative of the Department of Justice:

> In sum, although we favor the granting of judicial enforcement authority to the EEOC, we are concerned that at this point in time there be no elimination of any of the remedies which have achieved some success in the effort to end employment discrimination. In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination.
>
> • • •
>
> The problems is widespread and we suggest that all available resources should be used in the effort to correct it.

118 *Cong. Rec.* 3372 (1972).

Senator Williams noted:

> In my judgment, Mr. President, it could not be put more forcefully and more precisely.
>
> We are dealing with a problem in this country that needs all available resources to wipe from our land the terrible condition in which a human being can be and is discriminated against because of nothing that he had anything to do with—a discrimination that is based on race, color, religion, sex, or national origin. All available resources should be available to that individual... One way to reach it is not to strip from that individual his rights that have been established, going back to the First Civil Rights Law of 1866.

Id.

Moreover, House Report No. 92-238 (cited previously in Novotny's argument 1D, above) noted in part:

> An examination of the statistics with respect to the progress of equal employment opportunities clearly shows that the voluntary approach currently applied has failed to eliminate employment discrimination.
>
> • • •
>
> ...Effective remedies have not resulted from present practice.
>
> • • •
>
> The situation of the working women is no less serious.
>
> • • •
>
> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex.
>
> • • •
>
> ...The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings.
>
> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination, against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

2 U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess., 2137, 2139-41 (1972).

Based on these readings, Novotny contends that any suggestion that Congress intended to eliminate *any* remedy which might constitute an added means of enforcing equal employment opportunity is absurd. It is beyond question that Congress neither intended to make Title VII the exclusive remedy for rights created therein, nor intended to abrogate in any manner the various statutory remedies for discrimination.

C. The Directors' Reliance On Doski And Brown Set Forth In Their Brief Is Unjustified.

Novotny contends that the reliance of the Directors on *Doski v. M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976), (Pet. Br. at 35), and *Brown v. General Services Administration*, 425 U.S. 820 (1976), (Pet. Br. at 37), is misplaced.

With regard to the §1985(3) claim in *Doski*, Novotny contends that even if the Fourth Circuit was correct in its assumption that Title VII rights and §1985(3) rights were created simultaneousiy by the enactment of Title VII, the failure to accord the §1985(3) remedy is to ignore the independent anti-conspiracy interest embodied in that statute. (*See* the remarks of Rep. Shellabarger regarding the "gist of the offense in the second section," in *Cong. Globe*, 42d Cong., 1st Sess. at H. App. 113-14; the remarks of Rep. Ellis H. Roberts at *Cong. Globe, supra*, at 412 (April 1, 3, 1871); and the remarks of Senator Morton, *Cong. Globe, supra*, at S. App. 252, regarding "confederated action") Not only was the statute a remedy for deprivation of equal privileges and immunities, but it had as its specific aim the neutralizing of conspiratorial activity. Moreover, to the extent that Novotny argues below that §1985(3) protects against the denial of equal employment opportunity, either under Title VII or as

the elimination of a badge of slavery through the thirteenth amendment, such equality arises as an independent right, not dependent on the fourteenth amendment. *Doski*, therefore, is inapposite to the issues.

With regard to *Brown*, Novotny notes that the case is easily distinguishable from the instant one. In that portion of the opinion not quoted by the Directors, this Court said the following, commenting on the congressional belief that it was creating in Title VII the only remedy available for federal employees:

> [T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.
>
> This unambiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination.

425 U.S. at 828-29.

Continuing on to explain why its ruling differed from that in *Johnson v. Railway Express Agency*, 421 U.S. 454, and why *Johnson* did not apply, the Court said:

> In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon the explicit legislative history of the 1964 Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. . . ."

425 U.S. at 833.

In other words, in one instance, Congress simply intended the remedy to be exclusive and in the other, it did not. Novotny believes that the Directors' references to

United States v. DeLaurentis, 491 F.2d 208 (2d Cir. 1974), (Pet. Br. at 33), *International Brotherhood of Teamsters v. Daniel*, 47 U.S.L.W. 4135 (January 16, 1979), (Pet. Br. at 38), and *Platt v. Burroughs Corp.*, 424 F.Supp. 1329 (E.D. Pa. 1976), (Pet. Br. at 33), may be analyzed based on congressional intent in the same fashion.

Accordingly, since Congress did not express an intent to make Title VII an exclusive remedy for sex discrimination, a §1985(3) claim may be pursued.

IV. THERE ARE AT LEAST TWO SOURCES OF CONGRESSIONAL POWER TO SUPPORT A §1985(3) PROHIBITION AGAINST SEX DISCRIMINATION IN EMPLOYMENT.

A. The Commerce Clause Forms A Basis Of Constitutional Authority For The Application Of §1985(3) To This Case.

The Directors maintain, beginning at page 40 of their brief, that the commerce clause cannot provide a source of constitutional power for the enactment of §1985(3).

They contend, initially, that the commerce clause was not intended to be the source of such power.

This Court, in *Griffin*, never indicated that the identification of a source of congressional power depended on a specific expression of intent. *See Woods, Housing Expediter v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) and *Ex Parte Yarbrough*, 110 U.S. 651 (1884). Actually, however, expressions of legislative intent that are found in the history suggest that Congress called upon *whatever* power it possessed to accomplish the goals of the Act.

Representative Monroe, recorded in the *Cong. Globe*, 42d Cong., 1st Sess., at H. 370, (March 31, 1871), said as follows:

> In interpreting the constitution of any great, free country there is a fair presumption that it contains sufficient grants of power to the legislative body to secure the great primal objects for which constitutions and governments exist.

Representative Shellabarger noted (*Cong. Globe*, 42d Cong., 1st Sess., at App. 69 (March 28, 1871) that:

> Congress is charged with the duty of "enforcing by legislation every constitutional provision. This grows out of the position and nature of such a Government as ours, and is as imperative in the cases not enumerated specially in respect to such legislation as in others." In shorter words, Congress is bound to execute, by legislation, every provision of the Constitution, even those provisions not specially named as to be so enforced.

The right to travel, which this Court in *Griffin* found to be an appropriate source of congressional power to reach a §1985(3) conspiracy, had been held by this Court to be grounded in the commerce clause both prior to the passage of the Civil Rights Act of 1871 and subsequently thereto. Sixty-five years before ratification of the fourteenth amendment, Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D.Pa. 1823), recognized the right to travel as grounded on the privileges and immunities clause of the Constitution, Art. IV, §2. Not long thereafter, this Court in the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), analyzed the right in terms of the commerce clause. In dissent (on other grounds), Justice Taney recognized the right as one of national citizenship. 48 U.S. (7 How.) at 492. The Taney approach was followed by the Court in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868), although Justices Clifford and Chase in concurrence rested on commerce clause grounds. In *Edwards v. California*, 314 U.S. 160, 172 (1941), the Court squarely based the right on the commerce clause, with Justices Douglas and Jackson in concurrence but preferring to

define the right as one of national citizenship protected by the privileges and immunities clause of the fourteenth amendment.[11] *Id.* at 178, 183. In *Edwards*, the majority decision "was consistent with precedents firmly establishing that the federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities." *United States v. Guest*, 383 U.S. 745, 758-59 (1966).

Infringement of the right to travel has been held to be punishable by federal conspiracy statutes for nearly three quarters of a century. In *United States v. Moore*, 129 F. 630, 633 (N.D. Ala. 1904), the right was explicitly recognized as protectible under what is now 18 U.S.C. §241, a statute this Court in *Griffin* characterized as the closest remaining criminal analogue to §1985(3) 403 U.S. at 98. This dictum in *Moore* was elevated to a holding in *Guest*, 383 U.S. at 759, based on the relationship to the commerce clause.

In addition to the right to travel, rights created by Title II, the public accommodations provision of the Civil Rights Act of 1964, 42 U.S.C. §2000a, have been held by this Court to be protectible under 18 U.S.C. §241. *United States v. Johnson*, 390 U.S. 563, 565 (1968). Title II was explicitly upheld by this Court as a constitutional exercise of Congress' commerce powers. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).[12]

[11] In *Heart of Atlanta Motel, Inc. v. United States, supra* at 279 (1964), Justice Douglas noted that his reluctance to rest solely on the commerce clause in both that case and in *Edwards* was "not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights."

[12] In *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 203 (1944), this Court held that the Railway Labor Act, 45 U.S.C. §151 *et seq.*, passed pursuant to Congress' commerce clause powers, imposed a duty on a labor organization acting under the statute as the exclusive bargaining representative to represent all employees without discrimination because

(continued)

Thus, it is clear that according to this Court's precedents, federal rights recognized as deriving from the commerce clause can give rise to a cause of action under the federal conspiracy statutes.

Since they appear to recognize that what Congress had the power to do under Title VII, it might have power to do under §1985(3), the Directors attempt to demonstrate the alleged lack of constitutional authority for §1985(3) by engrafting onto the constitutional power a condition that Congress must incorporate into the statute's framework the "elements of proof" concerning its affect on commerce. Such a condition is not a requirement, Novotny suggests, and while the Court in *Katzenbach v. McClung, supra*, made "mention" of testimony at hearings before Congress prior to the passage of the legislation, it determined that no formal findings were necessary to make the act valid and that no provision was necessary for an independent inquiry regarding the effect on commerce of the prohibited activity.

The Directors lean on the proposition that §1985(3) is a remedial statute and creates no substantive rights of its own. If such is the case its constitutional source is the same as the source of Congress' power to create the right which is in question. If the right is created pursuant to the commerce clause, as the Directors concede, and the creation of the right is itself constitutional (a proposition not challenged by the Directors in regard to Title VII), then Congress has the power to protect that right.

In construing §1985(3), this Court in *Griffin v. Breckenridge*, 403 U.S. 88, looked to the constitutional source of the

of race. This duty implied a correlative federal right secured by the statute. *Id.* at 204. Having implied a statutory right, this Court then fashioned a remedy for breach of the implied statutory duty. *A fortiori*, this Court can apply an express congressional remedy, §1985(3), for violation of an express statutory right, Title VII created under Congress commerce powers.

substantive right protected in order to determine the source of congressional power to prohibit a conspiracy to violate that right. The analysis relied upon earlier Supreme Court constructions of 18 U.S.C. §241.[13] "It has long been settled," Justice Stewart wrote for the Court, "that 18 U.S.C. §241, a criminal statute of far broader phrasing [than 42 U.S.C. §1985(3)], reaches wholly private conspiracies, and is constitutional." 403 U.S. at 104.

The Court first upheld the constitutionality of 18 U.S.C. §241, then Rev. Stat. §5508, in *Ex Parte Yarbrough*, 110 U.S. 651. The defendants had been charged under the Act with conspiring to interfere with the right of a black person to vote in a congressional election. They challenged the constitutionality of §5508 on the ground that no express power authorized Congress to protect the right to vote. This Court found the right to vote for a member of Congress inherent in the Constitution, Art. I, §2, which created the congressional position and provided that it should be filled by election. In addition, the fifteenth amendment was found to "substantially confer on the negro the right to vote." 110 U.S. at 665. Laws such as Rev. Stat. §5508, passed by Congress to protect this right, "stand upon the same ground and are to be upheld for the same reason." *Id.* at 662. The congressional power to enact such laws "arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States." *Id.*

[13] 18 U.S.C. §241:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $5,000.00 or imprisoned not more than ten years, or both.

Eight months after *Yarbrough* was decided, this Court was faced with another challenge to the constitutionality of Rev. Stat. §5508 in *United States v. Waddell*, 112 U.S. 76, as cited by the Third Circuit in the instant case. In determining the proper source of congressional power to protect homesteaders through §5508, the *Waddell* Court looked to the power of Congress to enact the substantive statutory right provided by the Homestead Acts. The source of the power was found to be Art. IV, §3 of the Constitution, which vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. In rejecting the argument that the conspiracy statute was unconstitutional, the Court looked to the constitutional base of the substantive right, stating:

> Whenever the acts complained of are of a character to prevent the exercise of a statutory right or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress a person because he has exercised it, then, *because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such a statute.*

112 U.S. at 80 (emphasis added).

An analysis similar to *Waddell* took place in *Logan v. United States*, 144 U.S. 263 (1892), where the congressional power to prohibit a conspiracy to injure persons who were in the custody of a federal marshal was found to rest in the power to prohibit crimes against the United States. In that decision, the Court reviewed the prior decisions dealing with the constitutionality of Rev. Stat. §5508, and reaffirmed the established principle that:

> [E]very right created by, arising under, or dependent upon the Constitution of the United States may be

> protected by such means and in such manner as Congress, in the exercise of . . . the legislative powers conferred upon it by the Constitution may in its discretion deem most eligible and best adapted to attain the object.

144 U.S. at 293.

In *Griffin*, this Court identified two sources from which rights protected by §1985(3) might derive—the thirteenth amendment and national citizenship itself (403 U.S. at 105-06). Since the Court recognized that what Congress had done by §1985(3) was to create a "statutory cause of action" (*Id.* at 105), the question of constitutional power relates to the right the violation of which gives rise to the cause of action. (Whether §1985(3) has an independent commerce base is not before this Court.) Novotny suggests that there can be no serious doubt that if Congress had the power under the commerce clause to create a right to equal employment opportunity, it also had the power to create a cause of action, either in the same or in another enactment, for a conspiratorial discriminatory interference with such a right.

The analysis suggested by *Yarbrough*, *Waddell* and *Logan* was the same analysis followed by this Court in *Griffin*. In each case the Court first determined the constitutional source of the right interfered with and applied the anti-conspiracy remedy to it. The Third Circuit, appropriately, did the same thing.

B. The Inability To Sell One's Labor Free From Invidious Discrimination Is A Badge Or Incident Of Slavery Which Congress Had The Obligation To Abolish For All Persons Under The Thirteenth Amendment.

The Directors have suggested that although the thirteenth amendment, by its own terms, prohibits the imposition of slavery on any person, Congress is somehow limited to the eradication of slavery as it was practiced at the time the amendment was approved, to-wit, slavery on the basis of race and color (Pet. Br. at 44). Of course, slavery at that time was practiced on the basis of race and color *only* against black persons, so the logical extension of the Directors' argument is that Congress has the power to eradicate slavery only if blacks are slaves or marked with the badges of slavery. If this were true, then *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) cannot have been decided properly. Moreover, the Directors give no clue as to their conclusion that the grant of power in the thirteenth amendment was *limited* to slavery based upon race.

It may be, without conceding such, that §1981 was concerned only with *racial* discrimination in contract rights (*Cf. McDonald v. Santa Fe Trail Transportation Co., supra* at 287), but the Directors' suggestion that Congress has the power to deal *only* with slavery based on race surely must be erroneous. "Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72; *see also Civil Rights Cases*, 109 U.S. at 20, cited by this Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-39 (1968).

Further, the Directors' analysis of *Jones* ("the thirteenth amendment, as interpreted in *Jones*, only authorizes remedial legislation which prohibits discrimination on the basis of race or color" (Pet. Br. at 44)) is equally incorrect since there is nothing in *Jones* which is so limiting. The *Jones* Court had only one constitutional question to decide: "Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' *include* the power to eliminate all racial barriers to the acquisition of real and personal property?" 392 U.S. at 439 (emphasis added).

In answer to the question, the Court said:

> "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—*it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more.*

Id. (emphasis added)

Any suggestion, therefore, by the Directors that the power of Congress to enact legislation to enforce the thirteenth amendment was limited to the eradication of slavery as it existed at that time is clearly wrong.

In addition, Novotny finds nothing in *Jones* to suggest that the thirteenth amendment (as opposed to §1981 or §1982) was limited to discriminations based on race, and the claim of the Directors (Pet. Br. at 44), based on their reading of *Runyon v. McCrary*, 427 U.S. 160 (1976) and *Jones*, that civil rights statutes looking to the thirteenth amendment must be limited to racially motivated discrimination, is also in error.

In *Runyon*, the Court addressed two basic questions: "whether §1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied." 427 U.S. at 168.

Accordingly, the Court had no occasion to have to decide the question of the scope of congressional power under the thirteenth amendment outside the area of race, and it did not.

The Directors further cite *United States v. Cruikshank*, 92 U.S. 542 (1876), and indicate that the Court dismissed an

indictment charging interference with rights granted under the Constitution and laws of the United States because of the failure of the indictment to alleged racial prejudice as a motive (Pet. Br. at 45). The suggestion is made by the Directors that only racially motivated private action could be prohibited under the thirteenth amendment.

A thorough reading of *Cruikshank*, however, reveals no such indication by the Court. What the Court did say was:

> No question arises under the *Civil Rights Act of April 9, 1866* (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

92 U.S. at 555 (emphasis added)

All the Court was indicating was that since the Civil Rights Act of 1866 was passed for the protection of black persons, an allegation that the victims were deprived of rights existing by virtue of *that Act* must charge that Defendants were motivated against the victims because they, the victims, were black. Nowhere in *Cruikshank* does it say, or even suggest, that the thirteenth amendment was *limited* to the protection against racially motivated enslavement or servitude.

Novotny contends that the Directors' reliance on *United States v. Harris*, 106 U.S. 629 (1883) (Pet. Br. at 45), is also misplaced. In view of subsequent case law, the restrictive analysis of the thirteenth amendment set out in *Harris*, 106 U.S. at 640-43, cannot be considered controlling. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409; *Griffin v. Breckenridge*, 403 U.S. 88; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Runyon v. McCrary*, 427 U.S. 160; *cf. Clyatt v.*

United States, 197 U.S. 207 (1905) (anti-peonage statute enforced irrespective of the race of the parties.)

In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court enumerated some, though not all, of the fundamental rights with which Congress sought to deal:

> Congress . . . by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

109 U.S. at 22.

The Court did not commit itself to the conclusion that all of those enumerated rights are in fact fundamental, and one commentator has suggested that the Court was simply describing what Congress had attempted to do. *See* Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation against Private Sex Discrimination*, 61 Minn. L. Rev. 313, 351 n. 149 (1977). Nevertheless, this Court has repeatedly held that Congress has the right to determine for itself what are the badges and incidents of slavery and "to translate that determination into effective legislation." *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 440. In *Jones*, the Court specifically overruled *Hodges v. United States*, 203 U.S. 1 (1906), to the extent that that case had held that an interference on racial grounds with the right to dispose of their labor by contract was not a badge or incident of slavery. 392 U.S. at 441-42 n.78.

In *Hodges*, Justice Harlan, who dissented, asserted that: "One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage." 203 U.S. at 34.

In *Jones*, this Court seems to have adopted the broader view of the thirteenth amendment espoused by Harlan's dissent in *Hodges*, and has since made it unquestionable that the thirteenth amendment supports the freeedom to contract without discrimination in private employment as one of the rights of citizenship which spell the difference between freedom and slavery. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273. Moreover, this Court has consistently held that the thirteenth amendment's abolition of slavery applies to *all* citizens. In one portion of *Hodges* not inconsistent with the opinion in *Jones*, the Court indicated that the thirteenth amendment "reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof (203 U.S. at 17); and in *Bailey v. Alabama*, 219 U.S. 219, 241 (1911), the Court called the amendment "a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag."

Both this Court, in *Kahn v. Shevin*, 416 U.S. 351, and *Califano v. Webster*, 430 U.S. 313, and Congress, have recognized the important governmental interest in remedying the debilitating effects of past widespread sex discrimination in the marketplace. Limited as it is to class-based invidious discriminations such as sex, §1985(3) provides an effective and much needed means of furthering that governmental interest.

Clearly, neither women in general nor any one of them, may be deprived of rights which spell the difference between freedom and slavery. Since the ability to contract for private employment is a right which spells the difference between freedom and slavery, and since Congress has the power to legislate for the purpose of preventing a discriminatory interference with that right, Congress has the power under the thirteenth amendment to legislate against private (*Griffin*, 403 U.S. 88) employment discrimination based on sex.

Accordingly, if §1985(3) was legislation to protect against discriminatory interference with those fundamental rights, Congress could find its source for that power in the thirteenth amendment.

CONCLUSION

For the foregoing reasons, Novotny contends that the Directors may be personally liable for their conspiracy to deprive women of equality of rights under federal law, which conspiracy resulted in substantial damage to Novotny, who requests accordingly that the judgment of the United States Court of Appeals for the Third Circuit be affirmed, and that the case be remanded to the District Court for trial on the merits of the complaint.

Respectfully submitted,

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